SUPREME COURT, U. S.
MAR 31 1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-903

EDWARD H. DYKE,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

THOMAS R. MORAN, Esq.
Room 53
Criminal Court of Fulton County
160 Pryor Street, S. W.
Atlanta, Georgia 30303
Counsel for Respondent

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PART ONE

The State of Georgia, Respondent, by and through Hinson McAuliffe, Solicitor General, Criminal Court of Fulton County, pray that the Application for Writ of Certiorari to the Supreme Court of Georgia to review the judgment entered in this case on September 24, 1974, be denied.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 232 Ga. 817, 209 S.E. 2d 166 (1974). It is also set out as" Exhibit A" in Petitioner's Petition for Writ of Certiorari, appendix.

JURISDICTION

Respondents adopt Petitioner's jurisdictional statement.

QUESTIONS PRESENTED

1. Whether the trial court erred in its instruction to the jury.

2. Whether the rulings by the trial judge prejudiced the defendant.

3. Whether the court erred in admitting into evidence the defendant's statement that he was the manager in response to a question by a law enforcement official without *Miranda* warnings where the defendant was not in custody nor had the investigation focused upon him.

4. Whether the affidavits upon which the seizure of the films were based were sufficient and did not amount to a mere conclusion of law enforcement officials.

5. Whether the accusing of the defendant in two counts alleging that the date is an essential averment subjected the defendant to multiple prosecutions for the same offense, thereby violating the double jeopardy provisions of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Repondents adopt the constitutional and statutory provisions set forth in Appendix "B" of the Petition for Certiorari, appendix with the addition of Ga. Code Ann. 24-104 (4) set forth as appendix "A".

STATEMENT OF FACTS

At the request of the Solicitor General of Fulton County, on October 23, 1973, an Investigator for the Office of the Solicitor General experienced in investigating obscene films went to the Festival Theatre in order to view a film. The marquee of the theatre read "The Devil in Miss Jones" and the admission price was five dollars. After viewing the film "The Devil in Miss Jones" the investigator wrote an affidavit, presented it to a judge the following day and a search warrant issued. After viewing the film again, the investigator approached the counter in the theatre and asked the defendant who the manager was. After the defendant informed the investigator that he was the manager, the investigator identified himself, served the search warrant, took one copy of the film "The Devil in Miss Jones," and arrested the defendant and other employees. A commitment hearing was had on November 2, 1974, and the defendant was bound over.

On November 5, 1974, three days after the defendant's commitment hearing, the same investigator returned to the same theatre and again viewed the film "The Devil in Miss Jones." The investigator again drew an affidavit and obtained a search warrant which was served November 6, 1974. Each time the investi-

gator went to the theatre, the defendant was present. The commitment hearing on the second arrest was waived. Thereafter, a two count accusation was drawn alleging that the defendant distributed obscene material on two named dates, the dates being an essential averment.

At no time did the defendant contend that he did not have a print to show during the period between arrest and commitment.

On the trial of the case, the film was shown to the jury. The film is hard core pornography and consisted entirely of acts of intercourse, sodomy and masturbation. The jury returned a verdict of guilty on both counts.

The Supreme Court of Georgia affirmed and a petition for certiorari was filed in this court on January 22, 1975.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. THE INSTANT CASE DOES NOT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT NOR DECIDE SUBSTANTIAL FEDERAL QUESTIONS OF NATIONWIDE IMPORT.

1. THE COURT DID NOT ERR IN ITS CHARGE ON THE ELEMENTS OF OBSCENITY.

The charge of the court must be taken as a whole, Fox v. Burns, 142 Ga. 119, 82 S.E. 521 (1914). See Cooper v. State, 212 Ga. 367, 92 S.E. 2d 864 (1956). Out of an abundance of caution and because of the complexity of the issue the trial judge instructed the jury on the elements of the offense numerous times. Each time, although the wording was different, the elements

were the same—that is, as a matter of law, the charges complained of, taken as a whole comport in every way to the language in Paris Adult Theatre v. Slaton, 231 Ga. 312; 201 S.E. 2d 440 (1973).

The court charged the jury twice that the "sexual conduct" was the depiction of nudity or excretion in a patently offensive way. A statement of law founded upon Paris Adult Theatre v. Slaton, 231 Ga. 312; 201 S.E. 2d 440 (1973).

The court was careful to instruct the jury that it in no way was emphasizing any part of the charge by repeating. The part of the charge underlined by defendant in his brief and which are referred to as argumentative were approved in Hamling v. U.S. _____ U.S. _____; 94 S.Ct. 2887 (1974).

The charge objected to is as follows:

> "The Court charges you in this connection that what is obscene material is determined by the sensibilities and the moral standards of the people or community as a whole, and that is the community of Georgia, as evolved from generation to generation along with our civilization. What is obscene in one period may not be obscene in another period of our civilization. Whether one commits a violation of the Georgia law, as heretofore given you in this charge, depends upon the time, the place, the manner by which one exhibits or offers to do the same, or otherwise disseminates the alleged obscene material and all of the circumstances surrounding the exhibition, or the offering of the exhibition of the same—in this case it's the film.
>
> In determining whether the material predominantly appeals to a shameful and morbid interest in sex, excretion, or nudity, and whether the said material is patently offensive because it goes sub-

> stantially beyond the customary limits of candor in describing or representing certain matters; you must consider what, by general consensus of the community of Georgia, as a whole, whould be offensive to the common instincts of decency of people generally."

This court approved the following charge in *Hamling:*

> "The trial court instructed the jury that it was to judge the obscenity vel non of the brochure by reference to what is reasonable accepted according to the contemporary standards of the community as a whole . . . contemporary community standards means the standards generally held throughout this country concerning sex and matters pertaining to sex. This phrase means, as it has been aptly stated, the average conscience of the time, and the present critical point in the compromise between condor and shame, at which the community may have arrived here and now."

This is almost identical to the charge given by the trial court.

In addition, the court was very careful to point out in its charge that all the elements must "coalesce and co-exist." Any use of the disjunctive rather than conjunctive was amply cured.

The charge given the jury as to the weight of opinion testimony is a correct statement of the law. Allen v. Allen, 71 Ga. App. 272; 30 S.E. 2d 665 (1944). Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); American Mutual Liability Ins. Co. v. Brackin, 68 Ga. App. 256; 23 S.E. 2d 505 (1942).

In any event, the evidence is so overwhelming against the defendant that any error in charge, if there is any, is only harmless error. Jones v. Ga. 105 Ga. 649 31 S.E.

505 (1898). No reasonable man after seeing "The Devil in Miss Jones" could doubt its obscenity.

2. THE TRIAL JUDGE DID NOT THROUGH HIS CONDUCT OF THE TRIAL INTERFERE WITH THE DEFENDANT'S DEFENSE.

It is the duty of counsel to protect their clients from wrong and injustice. It is the duty of the judge to protect the law from being outraged, Kelley v. Strouse, 116 Ga. 872; 43 S.E. 280 (1902).

The trial judge attempted at every phase of the trial to see that the ends of justice were met. Both the State and the defendant were treated equally and fairly. The Court bent over backwards to preserve error for defendant. The Court: I'm going to let you turn the lights out, and start from the beginning. Let it also be noted that Defense Counsel made no objection until the Court, at the beginning of it, made some statements about it. Now, if you have any legitimate grounds for preserving your clients rights, or the State's rights, then it's your duty to make objections and get it in the record, and it's the duty of the Court to see that it is in the record, and the Court will carefully guard those rights for you.

The judge asked for objections from Defense Counsel.

THE COURT: If I hear no objection. . . . The court was very careful to correct improper use of terms by the State's witness which would be injurious to the defendant.

Q: Now, when you say there were twenty-five to fifty theatres, tell the Court and Jury what you meant?

A: Well, I was referring to the skin flicks, the term that we use—

Mr. Deitch: Objection, your Honor, to the characterization of skin flicks.

THE COURT: I'm going to sustain the objection for the reason that Mr. Brown has already answered the question on cross examination. He stated that there were twenty-five or thirty, and then when he asked him about adult, using the term adult theatres, he stated, I think he said eight or more. Said he wouldn't be too specific on it. Now why do you want to get into it further? What do you want to ask that question again for, Mr. Moran?

MR. MORAN: Your Honor, I was listening to something else. I withdraw the question.

THE COURT: Now, the term skin flick, I don't know what that is. I don't know that that has any relevency in this case. It could be only a characterization someone uses. I don't know what characterization they use to make it sound good, or what you use to make it sound bad.

MR. MORAN: Yes, your honor.

THE COURT: Let's shy away from that and let the Jury be the determining factor.

Counsel complains he was hampered in his defense by the judges' rulings, however, the court has a duty to

> "control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." Ga. Code Ann. 24-104 (4).

Counsel in some instances was "playing it close to the line" and the trial judge would not permit it. An example was when the State offered to stipulate that

defendant's expert was a qualified clinical psychologist—in the face of a clear offer to stipulate, the defense counsel in the presence of the jury tried to misconstrue the State's offer and put something before the jury that was not there. The court stepped in to correct the situation and counsel now says such actions are error. Such matters are in the trial judges discretion and are not error unless abuse is shown. Carr v. Ga. 76 Ga. 592 (1885).

The general rule is "the trial judge has the right to propound a question or a series of questions to any witness for the purpose of developing fully the truth of the case, and the extent to which the examination conducted by the court shall go is a matter within his discretion. And a lengthy examination by the court of a witness called by either party will not be cause for new trial, even though some of the questions propounded by the court were leading in character, unless the court, during the examination of the witness by himself, expresses or intimates an opinion of the facts of the case, or as to what has or has not been proved, or the examination takes such course as to become argumentative in character." Wilson v. Ga., 229 Ga. 224; 190 S.E. 2d 539 (1972).

Most of the objections made by the trial judge were outside the presence of the jury.

However, the trial judges does not have to send the jury out when arguments of law are argued—it is a matter of sound discretion. Rutledge v. Hudson, 80 Ga. 266; 53 S.E. 93 (1887).

At one point in the trial, counsel attempted to put the Redrup argument before the jury—"unwilling adults" and was cut off by the court. He complains that

this is not fair. Defendant's idea of a fair trial seems to be that the defense can do anything, commit any error and argue anything so long as it is in his favor to do so without being stopped by the trial judge.

Defendant's expert witness is a prime example of the type of activity the trial judge had to control. Any trial court who has tried obscenity cases has had the same problem. These "experts" are not witnesses but paid advocates who are never responsive to questions but try to argue their position. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973) where it was said:

> "Indeed, the expert witness practices employed in these obscenity cases have often made a mockery out of the otherwise sound concept of expert testimony. Paris Adult Theatre v. Slaton, 413 U.S. 49 N6." *See Also* U.S. v. Groner, 479 F. 2d 577 (5th Cir. 1973).

An example of the expert attempting to go too far can be found in this case. Defense counsel asks the expert—have you read certain studies etc. He answered yes, and starts to go further. This court stops the witness and asks him—"please wait until he (defense counsel) asks you another question. If you go beyond that it opens the door to objections and wrangling here." From this statement of the trial judge, counsel attempts to say that the trial judge was "admonishing the witness for attempting wrangling," such assertions are absurd. At one point in the trial the witness was admonished to be responsive and the State was admonished to make objections promptly—a duty imposed on the trial judge under cases previously cited. At one point the witness even made the remark to the judge, "do I get a chance to answer this question?" After the State had objected to a previous answer and was sus-

tained. The judge had to send the jury out and admonish the witness. This is just another example of what courts in general and this trial court in particular have to contend with when these types of witnesses are used in obscenity cases. In the face of such activity the trial judge handled both counsel and witness with the utmost dignity and fairness and at every instance attempted to preserve all objections so that they may be properly reviewed. "The judge should always interpose whenever he sees that the law is about to be violated or a grave injustice is about to be accomplished.

3. THE COURT DID NOT ERR IN FAILING TO SUPPRESS STATEMENTS BY THE DEFENDANT THAT HE WAS THE MANAGER OF THE THEATRE.

Miranda warnings apply only to in-custody interrogations. Miranda v. Arizona, 384 U.S. 436 (1966).

The investigator testified that after going to the theatre armed with a warrant, he approached the defendant and without saying anything more asked him who was the manager. When the defendant answered that he was, he was served with the warrant and arrested. No *Miranda* warnings were given before the question was asked. However, it was important to realize that several persons other than the defendant were present before the defendant was asked who the manager was and also the investigator was going to arrest employees—he needed to determine who were employees before he could arrest anyone. Defendant argues that an officer cannot ask for identity before he arrests someone without giving Miranda warnings. It is important that the defendant at this stage was not

accused—the officer had to investigate in order to determine if the persons in the lobby worked at the theatre and therefore were the persons he was seeking to arrest, Carnes v. Ga., 115 Ga. App. 387; 154 S.E. 2d 781, cert. den. 389 U.S. 928 (1967).

People v. Jackson, 195 N.W. 2d 312; 37 McA 728 (1972) held that officers arriving on the scene and asking "what happened" did not violate *Miranda*. Here we have the same situation. It is important to note that the defendant was not in custody in the traditional sense. The investigation had only focused on several people in the lobby—there was no back room interrogation that occured in *Miranda*.

There is no evidence that the defendant was restrained in any manner nor that the question "who is the manager" was specifically aimed at the defendant.

In U.S. v. Leal, 460 F. 2d 385 (9th Cir. 1972) it was held that there is no *Miranda* warning required where one is legally stopped and asked to identify himself.

If defendants argument was correct it would be impossible to serve a warrant without giving *Miranda* warnings to anyone on the premises where the illegal activity occured.

The investigator's question was in effect the same as "I would like to see the manager." He was simply trying to find the person in charge and arrest him. The defendant was not "in-custody" until his identity was determined.

In the case of Brown v. Texas, 437 S.W. 2d 828 cert. den. 393 U.S. 1089 (1968) police officers executed a search warrant authorizing a search of defendants drug store and further authorized the arrest of defendant in

event of discovering narcotics. When the officers found a brown paper bag under the display case, and in the presence of two clerks and a clean-up boy, asked the defendant, "what is this?" The defendant replied "it is heroin, you have got me this time." Affirming the conviction the court held that the defendant had not been under arrest until his admission and that *Miranda* could not be interpreted to exclude res gestae.

4. THE COURT DID NOT ERR IN FAILING TO SUPPRESS THE EVIDENCE AS THE SEARCH WARRANTS WERE CONSTITUTIONALLY SUFFICIENT TO ALLOW THE MAGISTRATE TO FOCUS SEARCHINGLY ON THE QUESTION OF OBSCENITY.

The affidavit of the investigator dated October 24, 1973, sets out the various sexual acts performed in the films and they say "such acts as above consume the entire playing time of the film. This movie is hard core pornography." The investigator's second affidavit sets forth more detail but essentially sets forth the sex acts and then goes on to say that they take up the entire film.

The test for the sufficiency of a search warrant in this area is whether enough facts are before the magistrate to allow him to focus searchingly on the question of obscenity—here ample facts were set forth in the affidavits . . . scenes depicting acts described in *Miller* by way of illustration (i.e. depictions of ultimate sex acts actual or perverted) being distributed at a named place and time and the information less than twenty four hours old.

Unlike cases cited by the petitioner, there was much

more than the mere conclusion of the police officer that the material was obscene. *See* Roaden v. Ky., 413 U.S. 496 (1973) where the affidavit of the officer simply stated that the film was obscene. *Factual* affidavits of police officers are proper vehicles for the issuing of warrants in obscenity cases. Roaden v. Ky., 413 U.S. 496 (1973); Heller v. N.Y. 413 U.S. 483 (1973); Crecelius v. Commonwealth, 502 S.W. 2d 89 (1973).

Defendant complains that the affidavits set out only the sexual conduct in the film. However, as anyone who has seen the film knows, there is no other activity portrayed other than sexual activity.

5. ACCUSING THE DEFENDANT IN TWO COUNTS, ALLEGING THAT THE DATE IS AN ESSENTIAL AVERMENT DID NOT AMOUNT TO SUBJECTING THE DEFENDANT TO MULTIPLE PROSECUTIONS FOR THE SAME OFFENSE.

This court has held that there could be multiple prosecutions of continuous criminal acts where each act is a separate and distinct act although identical crime. Ebeleing v. Morgan, 237 U.S. 625 (1915) and, Georgia follows the same rule. Bloodworth v. State, 128 Ga. App. 657, 197 S.E. 2d 423 (1973); Martin v. State, 73 Ga. App. 573, 37 S.E. 2d 411 (1946).

Anyone who "exhibits" to "any person" obscene material is guilty of violating Ga. Code Ann. 26-2101. The crime is complete when the material is exhibited. Of course, it has always been held that the state cannot charge multiple offenses involving the same conduct unless each instance of the conduct complained of constitutes a complete crime. Estes v. Ga. 98 Ga. App. 521

106 S.E. 2d 405 (1958). In *Estes*, the defendant was charged with nine counts of carrying on a lottery on specific dates. However, the State failed to prove nine separate lotteries—they had to show nine separate prizes. Why?—because a lottery is a continuing transaction until the prize is awarded—there must be chance, consideration and prize. However, to distribute obscene materials, once the material is exhibited to any person the crime is complete. The material can be exhibited to any number of people any number of times. If the argument of defendant was correct a person could schedule multiple exhibitions of an obscene film and if arrested, tried and convicted, still show the material with immunity until his regular scheduling was completed. In fact the defendant continued to exhibit the film after he was arrested and after he was bound over for trial.

As was said by this Court in Steele v. Ga. 227 Ga. 653, 182 S.E. 2d 439 (1971):

> "In this case the State had the option of putting the defendant on trial for instance of malpractice in office because all of the essential elements would appear as to that offense, or put the defendant on trial for as many instances of the offense as it appeared he participated in over a period of time."

Here defendant participated in numerous separate exhibitions of the film to many persons over a period of time.

First Amendment rights deserve strong protection, but in this instance the defendant was put on notice through a commitment hearing that at least probable cause existed to believe that the film was not within the realm of protected expression.

Here the judiciary had acted so that the defendant's first amendment rights were not suspended by the second arrest upon the mere conclusions of a law enforcement official. See Roaden v. Ky., 413 U.S. 496 (1973); Heller v. N.Y., 413 U.S. 483 (1973).

The defendant, in the face of this initial judicial determination returned to the theatre and commenced to participate in the exhibition of a second print of the same film. Defendant acted at his own risk and should be stopped from claiming double jeopardy. *See* Crocelius v. Commonwealth, 502 S.W. 2d 89 (1973).

CONCLUSION

For the foregoing reasons, the instant case does not conflict with the applicable decisions of this Court nor decide substantial federal questions of nationwide import.

Respectfully submitted,

/s/

THOMAS R. MORAN
Assistant Solicitor
Criminal Court of Fulton County

Room 53
Civil Criminal Court Building
160 Pryor Street, S. W.
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three (3) copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage pre-paid addressed to Robert Eugene Smith, Esquire and Gilbert H. Dietch, Esquire 2005-100 Colony Square, Atlanta, Georgia 30361, counsel of record for Petitioner.

This the _____ day of _____, 1975.

/s/ _____

THOMAS R. MORAN
Assistant Solicitor General
Atlanta Judicial Circuit
160 Pryor Street, S. W.
Atlanta, Georgia 30303

APPENDIX "A"

24-104. (4644) Powers of courts enumerated.—Every court has power—

1. To preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings.

2. To enforce order before a person or body empowered to conduct a judicial investigation under its authority.

3. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding therein.

4. To control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto.

5. To administer oaths in an action or proceeding pending therein, and in all other cases, when it may be necessary in the exercise of its powers and duties.

6. To amend and control its processes and orders, so as to make them conformable to law and justice; and to amend its own records, so as to make them conform to the truth.